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Supreme Court, U.S.
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No. 95-445

IN THE
Supreme Court of the United States

October Term, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, ET ALS.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF OF THE FORMER DIRECTORS OF BROWN UNIVERSITY EMPLOYEES CREDIT UNION IN OPPOSITION

JAMES E. CARROLL
Counsel of Record
SHELIA HIGH KING
KIRSTEN M. LACOVARA
PEABODY & ARNOLD
One Citizens Plaza, Suite 840
Providence, RI 02903
(401) 831-8330

Attorneys for Respondents

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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QUESTIONS PRESENTED

1. Whether the court below properly held that a retroactive state statute does not offend the Due Process Clause of the Fourteenth Amendment, where (a) the statute was enacted subsequent to a banking crisis which affected the public welfare and gave rise to an avalanche of lawsuits against more than 100 alleged tortfeasors who may have contributed to the crisis; (b) the statute was enacted for the legitimate public purpose of facilitating settlement of the lawsuits in order to minimize state taxpayers' liability for the depositor bailout; (c) that legitimate public purpose is furthered by the statute's alteration of a non-settling joint tortfeasors' right to seek contribution from settling parties to induce alleged tortfeasors to seek finality of litigation; and (d) every alleged tortfeasor to whom the statute may apply has equal opportunity to gain the benefit of the statute and avoid its potential harshness.

2. Whether the court below properly held that Ernst & Young was afforded due process when Ernst & Young had (a) notice and an opportunity to be heard in the state legislature prior to the enactment of the retroactive statute and (b) notice and an opportunity to be heard in the state court in the settlement approval hearings.

PARTIES TO THE PROCEEDINGS

Petitioner Ernst & Young LLP was a third-party defendant in the proceeding below. Edward T. Broadmeadow, Alfred J. Corso, Larry D. Davidson, Stephen B. Forman, Robert R. Fournier, Geoffrey B. Hopper, Keith R. Phillips, and Michael A. Rizzo -- all present or former partners or employees of Ernst & Young LLP -- were also third-party defendants below.

Respondents Rhode Island Depositors Economic Protection Corporation and Edward D. Pare, Jr., Receiver of Brown University Employees Credit Union, were plaintiffs below.

Respondents Wilhelmina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Marisi Viau, John Doe and Jane Doe -- all former directors of Brown University Employees Credit Union -- were defendants and third-party plaintiffs below.

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No. 95-445

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et als.*
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE FORMER DIRECTORS OF BROWN UNIVERSITY EMPLOYEES CREDIT UNION IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondents Wilhelmina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Marisi Viau, John Doe and Jane Doe, the former Directors of Brown University Employees Credit Union (the "Brown Directors"), respectfully

request that this Court deny the Petition for Writ of Certiorari submitted by Ernst & Young LLP.

OPINIONS BELOW

On May 19, 1995 the Rhode Island Supreme Court answered questions transmitted by the state Governor and those certified by the Superior Court Justice on the constitutionality of a state statute, in the negative and held that the state statute is constitutional. The Rhode Island Supreme Court Opinion is reported at 659 A.2d 95 and is reproduced in the Appendix to Ernst & Young LLP's Petition for Certiorari (hereinafter referred to as "App.") (App.1a.). The opinion and the order of the Superior Court certifying the questions are unreported; however, the opinion and order are reproduced in the Appendix to Ernst & Young LLP's Petition for Certiorari. (App.21a, 26a.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The jurisdiction of the Rhode Island Supreme Court was invoked pursuant to Article 10, Section 3 of the Rhode Island Constitution and R.I. Gen. Laws 1956 (1993 Reenactment) § 9-24-27.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions cited by the Petitioner, the Brown Directors submit the following to this Court:

Section 42-116-12(i) of the Rhode Island General Laws provides in relevant part:

> (1) All net proceeds of litigation, (after payment of all legal fees, costs and expenses arising in connection therewith) whether by settlement or suit, prosecuted by an eligible institution, the receiver of an eligible institution and/or the corporation, shall be paid to the corporation and shall be utilized as follows:
> (i) To pay the guaranteed balances in accordance with subsection (e)(3); and
> (ii) After the guaranteed balances have been paid in full, to pay the loan obligations or bond indebtedness of the corporation.
> (2) The term "litigation," for purposes of this subsection shall mean all rights, claims and causes of action against:
> (i) Any eligible institution;
> (ii) The Rhode Island Share and Deposit Indemnity Corporation;
> (iii) And/or any officers, directors, employees, accountants, attorneys, appraisers, consultants, agents, or providers of professional services to the institution and/or the Rhode Island Share and Deposit Indemnity Corporation.

STATEMENT OF THE CASE

In 1991, the Rhode Island General Assembly enacted emergency legislation establishing respondent Rhode Island Depositors Economic Protection Corporation ("DEPCO"), a public corporation, in response to the collapse of the private deposit and indemnity insurer of 45 credit unions and financial institutions. (App.3a.) Funded by the Rhode Island taxpayers,

DEPCO was created to bail-out thousands of depositors whose funds had been frozen on January 1, 1991 when the then Governor of Rhode Island proclaimed a banking emergency and ordered the closing of the insolvent Rhode Island Share and Deposit Indemnity Corporation ("RISDIC") and the institutions it insured, including the not-for-profit Brown University Employees Credit Union ("Brown"). (App.3a.) In addition, the comprehensive scheme of the DEPCO legislation created a new receivership law for credit unions and financial institutions; obligated DEPCO to liquidate the assets of RISDIC and fourteen credit unions and financial institutions which did not reopen; and authorized DEPCO to pursue claims against alleged tortfeasors who contributed to the banking crisis. (App.3a.) The legislation mandated DEPCO to repay deposits, loan obligations and bond indebtedness from the net proceeds of litigation. *See* R.I. Gen. Laws § 42-116-12(i).

Armed with statutory authority, DEPCO asserted a variety of claims against a plethora of borrowers and former officers, directors and staff of RISDIC and the closed credit unions (including the Brown Directors) as well as against numerous professionals who had rendered expert services to RISDIC and the credit unions including, but not limited to, accountants such as Ernst & Young LLP ("Ernst & Young"). (App.4a, 23a.) Additionally, depositors filed over 170 complaints in the state court against the various directors, officers and staff of the closed institutions. On February 20, 1992, DEPCO, the permanent receivers of each of the closed institutions and other plaintiffs, filed a complaint against Ernst & Young in state court alleging negligence, breach of contract and negligent misrepresentation. The banking crisis spawned an ocean of lawsuits. (App.4a.) DEPCO opened settlement discussions and subsequently made demands on alleged joint tortfeasors in an attempt to collect its alleged damages.

In the ensuing months and years, DEPCO's settlement demands were spurned by the alleged tortfeasors because DEPCO would not agree to provide unlimited indemnification to those who were likely to be sued for contribution. In 1993, the Rhode Island General Assembly amended the DEPCO statutory scheme with a retroactive[1] statute (the "Act") designed to facilitate and promote settlement of the DEPCO claims against alleged tortfeasors by affording contribution protection to persons who resolve their liability with DEPCO in a judicially-approved good faith settlement. (App.4a, 5a.) Under the Act, a non-settling joint tortfeasor is liable for the full judgment amount of damages awarded against such tortfeasor less a *pro tanto* reduction equivalent to the settlement amount. In effect, the Act encourages settlements by (1) giving the alleged joint tortfeasors that settle first an opportunity to settle for less than the full amount of their potential joint liability without the risk of lawsuits from non-settling parties for contribution and (2) exposing non-settling joint tortfeasors to the possibility of bearing a disproportionate share of liability.

Less than a month following the Act's enactment, Ernst & Young filed a declaratory judgment action in the Federal District Court for the District of Rhode Island seeking a declaration that the Act is unconstitutional. (App.5a.) Ernst & Young appealed from the District Court's dismissal of the complaint on ripeness

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[1] The Brown Directors argued below that the Act does not operate in a retroactive manner because the Act has a prospective affect on inchoate contribution claims; the statute does not increase any person's liability (inasmuch as there is joint and several liability) and the statute imposed no new duties on any person. *See* Brief of Certain Former Brown Directors and Officers of Brown University Employees Credit Union as Proponents of the Constitutionality of Rhode Island General Laws § 42-116-40 at 13-14. The Rhode Island Supreme Court rejected this argument. (App.12a.)

and abstention grounds, and the United States Court of Appeals for the First Circuit affirmed noting that in order for Ernst & Young to be harmed by the operation of the Act, among other things, Ernst & Young must be found to have been negligent; its negligence must be found to have caused or contributed to the damages; a court must find it liable for an amount greater than Ernst & Young's ratable share of the damages and order Ernst & Young to pay the same, *Ernst & Young LLP v. Depositors Economic Protection Corp.*, 45 F.3d 530, 538 n.11 (1st Cir. 1995).

On September 29, 1994, more than a year after the passage of the Act, DEPCO filed a complaint against the Brown Directors in state court. The Brown Directors answered the complaint, denied DEPCO's allegations and asserted their affirmative defenses. The Brown Directors filed a third-party complaint against Ernst & Young and certain of its current and former partners. On October 14, 1995, the Brown Directors moved the state court to certify questions of the Act's constitutionality to the state Supreme Court. On October 17, 1994, DEPCO moved for approval of a settlement between it, the Permanent Receiver for Brown University Employees Credit Union and the Brown Directors. (App. 2a.) On the same date, DEPCO moved to certify questions, as well. (App.2a.) The Superior Court overruled Ernst & Young's objections (App.22a, 24a); approved the settlement (App.25a, 26a, 27a); and granted the motion to certify the questions (App.25a, 26a, 27a). In a separate proceeding, the Governor of Rhode Island requested an advisory opinion pursuant to Rhode Island law on the Act's constitutionality. (App.2a, 3a, 26a, 27a.) The state Supreme Court consolidated the proceedings and after entertaining full briefing and hearing oral argument, responded to the consolidated matters upholding the constitutionality of the Act in

the opinion from which Ernst & Young seeks review. (App.2a, 3a.)

REASONS FOR DENYING THE PETITION

The opinion below does not warrant review. The Rhode Island Supreme Court held that the retroactive operation of the challenged Act does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution because (1) a rational basis exists for the Act--the promotion of settlement which permits the cost efficient and expeditious collection of damages from alleged tortfeasors to reimburse DEPCO and the Rhode Island fisc for the depositor bailout before funds available to pay damages under defense-within-limits insurance policies are depleted; and (2) a legitimate public purpose is furthered by affording settling alleged joint tortfeasors protection from contribution claims by non-settling joint tortfeasors who risk the burden or benefit of a *pro tanto* set-off of their adjudged liability by the settlement amount.

Ernst & Young's sally that Rhode Island "rigged the rules" against it by passing the Act is the unfortunate remnant of petitioner's bias. Such a conclusion ignores the magnitude of the fiscal crisis that engulfed the state when the credit unions closed and the flood of litigation that ensued. The Rhode Island General Assembly's informed decision to fashion a remedy that would facilitate settlement of hundreds of lawsuits with all of the alleged tortfeasors involved in the credit union litigation belies any assertion of an improper motive of targeting the petitioner. Petitioner is just one of many alleged tortfeasors sued in hundreds of cases. Petitioner's decision not to settle and gain the benefit of the Act gives it a way to complain the loudest. After five years of litigation, it seems that is all the petitioner has left.

The Act does not violate principles of due process because it furthers the rational goal of encouraging settlement of the multitude of lawsuits arising out of the RISDIC and credit union closings. The principles of due process are easily satisfied and the impediments to retroactive economic legislation are easily overcome because the legislation is rationally related to a legitimate purpose. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994).

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS CORRECT BECAUSE THE RETROACTIVE OPERATION OF THE ACT FURTHERS A LEGITIMATE GOVERNMENTAL PURPOSE OF FACILITATING SETTLEMENT OF THE VAST AND COMPLEX LITIGATION ARISING OUT OF THE STATE'S CREDIT UNION CRISIS.

A. The Act Comports With The Requirements Of Due Process.

1. A Legitimate Public Purpose Furthered By Rational Means Justifies The Act.

Although this Court has repeatedly articulated the rule that the retroactive operation of a statute fully supported by a legitimate purpose and rational means comports with due process, *see, e.g.*, *United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976), Ernst & Young petitions this Court for certiorari review of the decision below in which the state court applied appropriately the rational basis and relationship test to the challenged Act. That test is the same

standard that is applied to prospective legislation. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 733.

Ernst & Young would have this Court substitute its judgment for the wisdom of the Rhode Island General Assembly because it would like to unravel a settlement induced by the Act. However, the Act satisfies the test for due process of law under the Fourteenth Amendment and therefore, "judgments about the wisdom of such legislation remain within the province of the legislature." *United States v. Carlton*, 114 S. Ct. at 2022 *quoting Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. at 730. Courts do not sit to decide whether the policy the legislature expresses offends the public welfare. *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

The Rhode Island Supreme Court found the Act bears a rational relationship to the legitimate state purpose of encouraging settlements with the defendants in the RISIDC-related tort cases so as to avoid the depletion of the "defense-within-limits" or "wasting-assets" insurance coverage available to pay settlements or satisfy judgments and thereby minimize the taxpayers burden for the depositor bailout.[2] App.9a, 9b, 15a. This purpose justifies the retroactive application of the Act.

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[2] The court below first held that the Act is "rationally related to legitimate public purposes" and therefore does not violate the Equal Protection Clause under the state and federal constitutions. The court then considered whether the Act is violative of due process. It followed *a fortiorari* from the court's conclusion that the Act bears a rational relation to legitimate governmental purposes that the Act would be sustained under the Due Process Clause of the Fourteenth Amendment. *See Minnesota v. Clover Leaf Creamery Company*, 449 U.S. 456, 470 n.12 (1981).

2. The Act Does Not Constitute Arbitrary And Unreasonable Governmental Action.

The *pro tanto* scheme the Act employs is rational, logical and effective. Only a showing that the legislature had acted in an arbitrary and irrational way could imperil otherwise valid economic legislation under the due process clause. *Pension Benefit Guaranty Corp. v. R.A. Gray*, 467 U.S. at 730. Perhaps, the unpersuasiveness of its own argument motivates Ernst & Young to contort federal case law to question the Act's rationality.

Despite Ernst & Young's inference otherwise, the Court's validation of the retroactive statute in *United States v. Carlton*, 114 S. Ct. 2018 (1994), does not hinge on Congress's motive on passing the statute involved in that case. This Court will not look behind retroactive legislation to infer an improper motive where a rational basis can be inferred. *See Carlton*, 114 S. Ct. at 2025 (J. O'Connor, concurring). Last year, Justice O'Connor wrote that "the subjective motivation" of the legislative branch in enacting a statute "to the extent it can even be known" is irrelevant in the context of economic legislation and "it is sufficient for due process analysis if there exists *some* legitimate purpose underlying the retroactivity provision." *Carlton, 114 S. Ct. at 2025*. In fact, it may be impermissible for courts to delve into the legislature's motives where as in *Carlton* and here, a rational basis for the Act exists. *See Smithfield Concerned Citizens v. Town of Smithfield*, 907 F. 2d. 239, 246 (1st Cir. 1990) (actual purpose that may have motivated proponents of ordinance is irrelevant for rational basis analysis").

Even this Court has paused to acknowledge, "Sometimes the *pro tanto* approach will better promote settlement." *McDermott v. AmClyde*, 114 S. Ct. 1461, 1468 (1994). Ernst &

Young's reliance on *McDermott v. AmClyde* in support of its constitutional challenge is misplaced. In *McDermott v. AmClyde*, an admiralty case, this Court stated that "[a]lthough Congress has enacted significant legislation in the field of admiralty law, none of those statutes provide . . . any 'policy guidance' or imposes any limit on our authority to fashion the rule . . ." that will best answer the questions of which credit reduction rule the court should apply. *Id.* at 1464. *McDermott v. AmClyde* involved consideration of a non-statutory, court imposed contribution bar. *Id.* That case does not stand for the proposition that the *pro tanto* rule lacks rationality but simply for the proposition that in the absence of statutory guidance the proportionate fault method should be used in admiralty cases to calculate a non-settling defendant's liability. *See id.*

B. The Strong Incentive For Settlement Created By Affording Settling Alleged Joint Tortfeasors Contribution Protection And Posing The Prospect Of Non-Settling Joint Tortfeasors Paying More Than Their Proportionate Share Of Liability Justifies The Retrospective Operation Of The Act.

Miscasting itself as the "target" of the Act, Ernst & Young complains of the harm it may suffer from the Act's allowance of a *pro tanto* reduction credit in the amount of the settlement. In fact, the *pro tanto* method presents the possibility that a non-settling party may pay less than its proportionate share if the settlement amount for which it receives *pro tanto* credit is greater than the amount later determined at trial to be the settling party's equitable share. *McDermott v. AmClyde*, 114 S. Ct. at 1467 n.14. Ernst & Young is but one of at least one hundred alleged joint tortfeasors who risk the benefits and burdens of the Act. The Act affords every DEPCO-related

alleged joint tortfeasor an opportunity to seek the protective shelter of the Act by negotiating a settlement early.

Yet, consistent with its self-fabricated victim's role and in an apparent effort to convince the Court it is a "target", Ernst & Young mischaracterizes an argument proponents of the Act's constitutionality made below. Certain *amici* noted in their *amicus curiae* brief that: "[t]he classifications employed by the [ ] Act increase incentives to settle . . . by granting the settling DEPCO tortfeasor the finality of complete protection from contribution and equitable indemnity on the basis of an approved settlement irrespective of proportionate fault, and by presenting the non-settling DEPCO tortfeasor with the risk of being subject to a level of exposure in excess of its proportionate fault." *Amicus Curiae* Brief on Behalf of Certain Officers and Staff of Rhode Island Central Credit Union, 14, submitted in the proceeding below. Although the *amici* did not single out Ernst & Young in their example, Ernst & Young recasts the *amici's* argument to incorrectly convey that the purpose of the Act is to "coerce Ernst & Young, the only national 'deep pocket' sued by DEPCO into settling . . . by changing the law of contribution so as to expose Ernst & Young to the threat of enormous and disproportionate liability." *See* Petition at 17.

Ernst & Young's attack on the Act's rationality flies in the face of this Court's precedents. Quite simply, the prospect of disproportionate liability created by the Act's contribution bar and *pro tanto* set-off scheme "promotes early settlements and deters litigation for litigation's sake . . . ." *See United States v. Cannons Engineering Corp.*, 899 F.2d. 79, 92 (1st Cir. 1990) (discussing the analogous CERCLA contribution protection statute). Readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *Usery v. Turner Elkhorn*, 428 U.S. at 16.

In its unrelenting campaign to cast the Act as unreasonable, Ernst & Young fails to mention that the appellate court in *TGB, Inc. v. Bendis*, 36 F.3d 916 (10th Cir. 1994) held that a district court impermissibly barred non-settling defendants' contribution claims against settling defendants because Congress had not authorized courts to bar federal statutory claims, *Id.* at 924. Indeed, the court in *TGB, Inc. v. Bendis* suggested Congress should follow the many states which have enacted statutes allowing contribution bars, and, further; cautioned that absent a law authorizing contribution protection, courts lack the power to bar federal statutory claims if they provide a specified reduction of any judgment against non-settling defendants. *Id.* at 924-925.

Ernst & Young overlooks the fact that the *TGB, Inc. v. Bendis* court identified five "unique incentives to settlement" that a contribution bar employing *pro tanto* credit creates: (1) a guarantee that the plaintiff will get whatever the jury awards at trial; (2) elimination of the risk of the plaintiff making a low settlement and collecting something less; (3) the ability for the plaintiff to fund further litigation; (4) the non-settling defendants post trial absorption of any shortfall of plaintiffs' settlement recovery discount; and (5) defendants' interest in avoiding paying more than their ratable share post-trial. *Id.* at 925. In other words, the line of cases upon which Ernst & Young relies to challenge the rational bases for the Act actually support the Act's rationality and stand for the proposition that interest in settlement cannot empower a court to bar contribution from claims under a *pro tanto* scheme without a statute authorizing the same. *See, e.g., id.*

II. THE ALLEGED CONFLICT BETWEEN THE DECISION BELOW AND THAT OF THE VIRGINIA COURT IN *SHIFLET* IS PROSPECTIVE AND DOES NOT JUSTIFY FURTHER REVIEW.

The Petitioner contends that the Virginia Supreme Court decision, *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), is at odds with the decision in the instant case. Petition at 19. The *Shiflet* case involved parties to an automobile accident in 1977. *Id.* at 117, 319 S.E.2d. at 752. The Shiflets brought negligence actions against two other drivers, *id.*, but in 1981 they executed a release with one of the two operators and reserved their claims with respect to Eller, the other driver, *id.* at 118, 319 S.E.2d. at 752. In 1979, Virginia enacted a statute which held that a release or a covenant not to sue, with regard to one of two or more persons who are jointly and severally liable in tort, does not release all other tortfeasors. *Id.* at 117, 119, 319 S.E.2d. at 752, 753. That new statute abrogated Virginia's common-law rule that a release of one tortfeasor is a release of all joint tortfeasors. *Shiflet*, 228 Va. at 119, 319 S.E.2d. at 753. The trial court granted Eller's motion to dismiss the Shiflets' action on grounds that the Shiflets' release of the other driver also operated as a release upon him. *Id.* at 118, 319 S.E.2d. at 752. On appeal, the Virginia Supreme Court concluded that because Eller's right to contribution arose in 1977, "it necessarily follows that the 1979 . . . statute . . . cannot be applied retroactively to impair that right." *Id.* at 121, 319 S.E.2d. at 750.

While it is true the Rhode Island Supreme Court found *Shiflet* unpersuasive, App.15a, it must be underscored that the *Shiflet* decision does not indicate whether it was based on the federal or Virginia constitution. Moreover, the Virginia court did not apply the rationality test and it offered no analysis of the

due process clause. In contrast, the Rhode Island Supreme Court applied the rational basis and relationship test and then added another layer of scrutiny by weighing the important public interests involved against any unfairness stemming from the retroactive application of the Act. App.15a, 16a. The court concluded that on balance any unfairness is outweighed by the public interests. App.15a, 16a.

Significantly, the *Shiflet* case neither involves a statute identical to the Act nor implicates a response to a statewide economic crisis. Ernst & Young has asked this Court to resolve a conflict that does not yet exist. *See* Petition at 19. It contends that "if Virginia enacted a statute identical to the Act . . . that statute would be . . . held unconstitutional." Petition at 19. Ernst & Young's request is premature inasmuch as the alleged conflict is prospective, at best.

III. ERNST & YOUNG HAS HAD AMPLE OPPORTUNITY TO BE HEARD.

Ernst & Young was afforded all process that is due and its assertions to the contrary were considered by the court below. It is apparent that Ernst & Young had an opportunity to be heard in the legislature. Indeed, Ernst & Young has been heard at every stage of this case. *See* App.22a. Ernst & Young was represented by counsel and expressed its viewpoint at the hearings in the proceedings below. *See* App.22a. Nonetheless, in purported support of its tortured claim that its procedural due process rights were violated, Ernst & Young cites additional cases dealing with hearing requirements for court imposed *pro tanto* contribution schemes. *See, e.g., In re Master Mates & Pilots Pension Plan*, 957 F.2d 1020, 1031 (2nd Cir. 1992); *In re Jiffy Lube Securities Litig.*, 927 F.2d 155, 160 n. 3 (4th Cir. 1991); *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975).

The current argument is a favorite one of Ernst & Young. Ernst & Young, a party in *In re Jiffy Lube Securities*, 927 F.2d at 159, challenged the settlement in that case. *Id.* There, just as in this case, Ernst & Young was given an opportunity to be heard at a hearing on the settlement. *Id.* at 159. The *Jiffy Lube* court stated that the trial court did not have a specific duty of fairness to Ernst & Young beyond ensuring it had been afforded the opportunity to be heard. *Id.* Ernst & Young knows the routine and should not complain in this case where its procedural due process rights have been protected.

In the proceedings below, Ernst & Young sought and obtained an enlargement of time to be heard on the settlement issue in this case. The credit union litigation had been in progress for over four years before the parties sought approval of a settlement. Ernst & Young reviewed over one million documents in the litigation below. The Superior Court offered Ernst & Young the opportunity to present whatever evidence it wanted to at the hearing to consider whether the settlement should be approved. All Ernst & Young could do was complain that the Act was unfair because proportional fault was not assigned. In choosing not to offer any evidence as to the adequacy of the settlement, Ernst & Young made a tactical decision. Ernst & Young's conduct at the hearing was tantamount to standing silent. That decision and not the mechanics of the hearing is now driving the argument that Ernst & Young had no opportunity to be heard.

The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). As this Court noted in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), once given the opportunity to be heard, a party can choose for himself whether to acquiesce or contest. The Act provides that there be a

judicially approved good faith settlement. As a third-party defendant, Ernst & Young was given notice and the opportunity to be heard on the issue of the good faith nature of the settlement. Nothing more is required.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted.

JAMES E. CARROLL
(Counsel of Record)
SHELIA HIGH KING
KIRSTEN M. LACOVARA
Peabody & Arnold
One Citizens Plaza, Suite 840
Providence, RI 02903
(401) 831-8330

Attorneys for Respondents

Wilhelmina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Marisi Viau, John Doe and Jane Doe, Former Directors of Brown University Employees Credit Union

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